IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

NO. 77-1378

JAPAN LINE, LTD.; KAWASAKI KISEN KAISHA, LTD.; MITSUI O.S.K. LINES, LTD.; NIPPON YUSEN KAISHA; SHOWA LINE, LTD.; and YAMASHITA-SHINNIHON STEAMSHIP CO., LTD.,
Appellants,

v.

COUNTY OF LOS ANGELES; CITY OF LOS ANGELES; and CITY OF LONG BEACH,
Appellees.

On Appeal From The Supreme Court Of The State Of California

BRIEF FOR THE CITY OF HOUSTON AS AMICUS CURIAE

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INTEREST OF AMICUS CURIAE

The Amicus Curiae, City of Houston, collects over $185 million in property taxes which provide for the local services provided to business and personal property, including intrastate, interstate and foreign businesses.

The assumption made and the positions taken by the Appellants would seriously erode the power of the Amicus to collect any of its ad valorem tax revenue if accepted by this Court.

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SUMMARY

The assumptions advanced and the arguments propounded by Appellants represent a failure to apprehend the meaning, import, and historical origins of both the Commerce Clause and the Due Process Clause.

The Commerce Clause, as originally adopted by the states was intended to vest in the federal government the exclusive power to regulate commerce with foreign nations, among the states, and with Indian tribes. The states retained their sovereign power to impose a non-discriminatory ad valorem tax on all property within their jurisdictions, even though they may have an effect on commerce. A tax would have been considered regulatory only when it discriminated against foreign or international commerce. This position can find its support in some of our earliest constitutional cases.

The Commerce Clause vested a single power in Congress to regulate commerce. The objects of that power differ but the nature of that power does not. The Commerce Clause does not prevent a state from imposing a non-discriminatory ad valorem tax on international commerce any more than it prevents it on interstate commerce. Again, some of our earliest cases are authority for this position.

The Due Process Clause demands that the state tax only those subjects within its jurisdiction. In the area of property taxation, the Due Process Clause is satisfied if the tax is properly apportioned.

The Due Process Clause does not compel the application of the "home port" doctrine to foreign owned instrumentalities of international commerce. The application of an apportioned tax to those instrumentalities when they are taxed in full at the foreign "home port" is neither discriminatory nor impermissibly burdensome.

The factors enumerated in *Complete Auto Transit v. Brady* are guides which aid in determining the constitutionality of state taxes. Their application is not compelled nor necessary in determining the constitutionality of the ad valorem property tax before this Court.

Finally, the argument that the municipalities affirmatively establish that they provide a tangible and direct service to Appellants which corresponds to the amount of the tax, is wholly without merit. The cases cited as authority for this position concern "users fees," a species of municipal exacation entirely different from the taxes involved in this case.

I. COMMERCE CLAUSE CONSIDERATIONS

A. The Commerce Clause Was Never Intended To Impede A State's Power To Impose A Non-Discriminatory Property Tax

Congress shall have the power "to regulate commerce with foreign nations, and among the several States, and with the Indian Tribes". U.S. Const., article I, section 8, clause 3.

The wording of this particular Constitutional Clause does not compel the conclusion that the states were originally prohibited from levying a non-discriminatory tax on property lying within their borders. In fact, it was not evident that this particular Clause infringed in the least upon the taxing power of the states until the *Case of the State Freight Tax* [*Reading Railroad Company v. Pennsylvania*], 82 U.S. (15 Wall.) 232 (1872) was decided in the latter part of the 19th Century. The Court concluded therein that a non-discriminatory tax levied upon freight travelling in interstate commerce was unconstitutional. Since that time, the Court has come full circle in its examination of the Commerce Clause. In

Department of Revenue v. Assoc. of Washington Stevedore Cos., ____U.S.____, 98 S.Ct. 1388, 55 L.Ed.2d 682 (1978), the Court indicated that, rather than expressing a prohibition on the *states,* the Clause should be construed as a grant of "special power" to the Congress.

It was established early in our Constitutional history that the Commerce Clause clothed the national government with the exclusive and plenary power to regulate commerce. *Gibbons v. Ogden,* 22 U.S. (9 Wheat.) 1, 196, 6 L.Ed. 23 (1824). Nevertheless, Chief Justice Marshall pointed out that although the states had relinquished the power to regulate national and foreign commerce, they had not relinquished the soverign power to tax property lying within their own jurisdictions.

This taxing power was considered essential to the very existence of state government, and it was not deemed to be dependent upon nor derivative of any federal authority. The exercise of this power ran concurrently with the operation of the federal government. *Gibbons v. Ogden, supra*; *Passenger Cases* [*Smith v. Turner*] 48 U.S. (7 How.) 283 (1848).

What is the exact relation, then, of the state taxing power to the federal commerce power? In *M'Cullough v. Maryland,* 17 U.S. (4 Wheat.) 316, 4 L.Ed. 579 (1819), the Court addressed this question in the examination of a state's power to tax a nationally chartered bank.

The Court held that a state could not "retard, impede, [or] burden" the operation of Congress in carrying out its vested powers. The Court added, however, that this

limitation upon a state's powers did not deprive the state from taxing property or other interests in banks as similar property was taxed within the state.

Where a state attempted to impose an occupation tax upon importers and wholesalers of foreign goods, the Court found an impermissible infringement upon Congress' power to regulate commerce. *Brown v. Maryland,* 25 U.S. (12 Wheat.) 419, 6 L.Ed. 678 (1827). The tax constituted a charge upon the process of introducing goods into the country, and the overall effect, the Court concluded, was a regulation of commerce. The Supreme Court did again acknowledge, however, that the states retained the power to tax all property and persons within their borders on a non-discriminatory basis.

In *Passenger Cases, supra,* the Court struck down a "head tax" exacted by a state upon the passengers and crew of foreign ships. When taxation became regulation, the Court reasoned, the state had exceeded its powers. Only Congress could regulate commerce. Nevertheless, a non-discriminatory tax on commerce-related property was empowered even though it may *affect* commerce.

From the very beginning of our Constitutional history, therefore, the courts have recognized and acknowledged the states' inherent powers to tax property lying within their borders. Those powers are exceeded, and the Commerce Clause is violated, only when taxation becomes regulation. A non-discriminatory tax upon commerce-related property does not constitute such a violation.

Where the Courts have departed from this principle, the departures were premised on the assumption that a burden upon commerce amounted to a regulation of

commerce. *Case of the State Freight Tax, supra.* Even then, however, the Court has distinguished the property tax from other kinds of taxes by characterizing it as an "indirect tax" and therefore not a burden upon commerce. In *Western Union Telegraph Company v. Taggart,* 163 U.S. 1, 16 S.Ct. 1054, 41 L.Ed. 49 (1896), the state levied an ad valorem tax upon the telegraph company's property located within the state's boundaries. The value used reflected the value of the company's entire capital stock. In upholding this tax under Commerce Clause considerations, the Court adopted the following language from *Railway Company v. Backus*:

> It is enough for the state that it finds within its borders property which is of certain value . . . It is protected by state laws, and the rule of all property taxation is the rule of value; and by that rule property engaged in interstate commerce is controlled, the same as property engaged in commerce within the state. Neither is this an attempt to do by indirection what cannot be done directly; that is to cast a burden on interstate commerce. It comes rather within that large class of state action, like certain police restraints, which, while indirectly affecting, cannot be considered as a regulation of, interstate commerce, or a direct burden upon its free exercise." 154 U.S. 446, 447, 14 S.Ct. 1114. (1894)

This long-standing principle that a non-discriminatory tax on commerce does not offend the Commerce Clause was recently affirmed in *Michelin v. Wages,* 423 U.S. 296, 96 S.Ct. 535, 46 L.Ed.2d 495 (1976), where the Court noted that Georgia's non-discriminatory property tax had no impact upon the national government's power to regulate foreign commerce.

B. The Foreign Commerce Provision Of The Commerce Clause Operates As No Greater Impediment To The State Taxing Power Than The Interstate Commerce Provision

Appellants assert that the taxability of foreign-owned containers engaged exclusively in international commerce is not finally settled by interstate commerce considerations. The difference, they maintain, is that instrumentalities of international commerce lie exclusively within the province of federal concern, and therefore they are not appropriate subjects of state taxation. Furthermore, the Appellants argue that any taxation of these containers by California municipalities, even on an apportioned basis, is precluded by the actions of Japanese authorities in taxing the containers at full value.[1]

1. The Two Provisions Are Of Identical Impact On State Taxing Powers

There is no sound basis for distinguishing between instrumentalities of foreign commerce and those of interstate commerce, as they relate to the state's taxing power. The commerce clause was adopted to overcome the principal weakness of the Articles of Confederation: the absence of power in Congress to regulate commerce and the presence of that power in the state. Hartman, *State Taxation of Interstate Commerce* (Dennis & Company, Inc. 1953).

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1. Appellants also contend that the taxes do not satisfy the "test" enunciated in *Complete Auto Transit v. Brady,* 430 U.S. 274, 97 S.Ct. 1076, 51 L.Ed.2d 326 (1977), that is, that the taxes be non-discriminatory, that the property have a nexus, that there be a fair relationship to the benefits provided and the tax imposed, and that the taxes be apportioned. The last three factors involve due process considerations and are addressed in Part 2 of this Brief.

There is no evidence in the early cases that the foreign commerce provision of the Commerce Clause was construed to be of greater importance or magnitude than the "among the several states" provision. An early analysis of the clause indicated that the provisions were but two aspects of the same power. Only the objects of the regulatory power differed. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 6 L.Ed. 23 (1824).

In *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419, 6 L.Ed. 678 (1927), the Court, speaking through Chief Justice Marshall, was obliged to treat both aspects of the commerce power similarly. Having concluded that both the Commerce Clause and the Import-Export Clause prohibited a discriminatory tax on foreign articles, the Court went on to suggest, "It may be proper to add that we suppose the principles laid down in this case apply equally to importation from a Sister state."[2]

In *Pullman's Palace Car Company v. Pennsylvania*, 141 U.S. 18, 11 S.Ct. 876, 878, 35 L.Ed. 613 (1891), the Court observed, "[i]t is equally well settled that there is nothing in the constitution or laws of the United States which prevents a state from taxing personal property employed in interstate or foreign commerce like other personal property within its jurisdiction."

The Supreme Court has not squarely confronted the issue of whether instrumentalities of foreign commerce

2. In *Woodruff v. Parham*, 75 U.S. (8 Wall.) 123 (1869), the Court did not follow the suggestion made in the *Brown* decision. Instead, it seized the original package language and held that the original package doctrine did not apply to the taxation of goods from Sister states. Commentators indicate, however, that the Import-Export clause was meant to apply both to goods from Sister states as well as from foreign countries. Clark, "Property Taxation of Foreign Goods and Enterprises—A Study of Inconsistency", 4 Pepperdine Law Review 39 (1976).

should receive different property tax treatment than those of interstate commerce.[3] In view of the earliest expression and the now accepted principle that non-discriminatory taxes are a valid exercise of state power, your Amicus would urge the Court to consider the taxability of foreign owned instrumentalities engaged in foreign commerce as it would those instrumentalities engaged in interstate commerce.

2. Taxation By A Foreign Country Does Not Preclude State Taxation Under The Commerce Clause

Appellants argue that because the foreign owned containers are taxed at full value by the government of domicile, the Commerce Clause prohibits the California municipalities from taxing on an apportioned basis. Appellants raise discrimination and multiple burdens as the objectionable result of the California tax.

3. In *McGoldrick v. Gulf Oil Corporation*, 309 U.S. 414, 60 S.Ct. 664, 84 L.Ed. 840 (1940), foreign commerce was pitted against New York State's sales tax. The sales tax was imposed on petroleum which was manufactured from imported crude and sold as ship's stores to vessels engaged in foreign commerce. The court viewed the pertinent statutory and regulatory scheme as determinative of congressional policy to exempt imported oil from state taxing powers. The court also characterized the imposition of the tax as a regulation of foreign commerce, and as such would have to give way to congressional policy. This case has been criticized because it equates the non-discriminatory tax exercise to a regulatory exercise. It has been suggested that the tax should have been analyzed on due process grounds. See Clark, "Property Taxation of Foreign Goods and Enterprises—A Study in Inconsistency", 4 Pepperdine Law Review 39 (1977). A further criticism is that the Court misinterpreted a custom regulation which the Court used as support for finding of Congressional intent. See *American Smelting & Refining Company v. County of Contra Costa*, 77 California Reporter 570 (Ct. App., 1969) appeal dismissed 90 S.Ct. 553.

The discrimination argument is as follows: Because other countries do not tax on an apportioned basis, California discriminates against foreign owned containers by imposing an apportioned tax which departs from the prevailing practice and results in duplicative taxation. This very argument was advanced and addressed in *Moorman Manufacturing Company v. Blair,* ____U.S. ____, 98 S.Ct. 2340, ____L.Ed.____ (1978). In that case Iowa imposed a net income tax based on an apportionment formula which departed from the scheme used by the majority of states. In noting the discrimination argument, the court stated in footnote twelve of the opinion:

> Appellant also contends that the Iowa formula discriminates against interstate commerce in violation of the Commerce Clause and the Equal Protection Clause, because an Illinois corporation doing business in Iowa must pay on a greater portion of its income than a local Iowa company and an Iowa company doing business in Illinois will pay on less of its income than an Illinois corporation doing business in Iowa. The simple answer, however, is that whatever disparity may have existed is not attributable to the Iowa statute. It treats both local and foreign concerns with an even hand; the alleged disparity can only be the consequence of the combined effect of the Iowa and Illinois statutes and Iowa is not responsible for the latter.

The *Moorman* rationale governs this case. The California municipalities are not responsible for nor can they control the exercise of Japan's taxing power. The concern clouds the real Commerce Clause issue, which is, does the tax discriminate against foreign commerce? The fact is that it does not.

The multiple burden argument is that the Commerce Clause requires the state to withdraw its taxing power whenever a foreign sovereignty exercises its full taxing power over the same subject, since there is no ultimate tribunal to compel a uniform system of taxation. Under Appellants' reasoning, a state's power to tax property within its jurisdiction depends on the whims of other governments. Carried to its logical extent, this argument requires that all instrumentalities of foreign commerce, whether owned by national or foreign governments, should be exempt from state property taxation. This clearly has never been the intent of the Commerce Clause.

In *Sea-Land Service Inc. v. County of Alameda,* 12 Cal. 3d 772, 117 Cal. Reporter 448, 528 P.2d 56, 67 (1974), the California Supreme Court observed, ". . . [i]t is clear that any threat of multiple burdens imposed by *foreign* taxing authorities is irrelevant to the crucial commerce clause issue of whether any *state* is discriminating against interstate or foreign commerce."

The commerce clause requires that the property tax be non-discriminatory. The tax in this case falls alike on all property having a presence within the California municipalities. No claim to the contrary is made. See *Complete Auto Transit v. Brady,* 430 U.S. 274, 97 S.Ct. 1076, 51 L.Ed.2d 326 (1977). Multiple burdens[4] are

4. It is interesting to note that among the factors formulated in *Complete Auto Transit* to "test" the state's taxing power, multiple burdens is not among them. This opinion recognizes that a fairly apportioned tax should necessarily avoid multiple burdens. See *Department of Revenue v. Association of Washington Stevedoring and Co.,* ____U.S.____, 98 S.Ct. 1388, 55 L.Ed.2d 682 (1978). However, to the extent that there is some overlapping of taxes, the Court recognizes that this alone does not invalidate a state tax under the commerce clause. *Moorman Manufacturing Company v. Blair,* ____U.S.____, 98 S.Ct. 2340, ____L.Ed.2d____ (1978).

avoided because the tax is fairly apportioned to the actual presence of the containers within the state.[5] Therefore, there is no commerce clause objection to the ad valorem taxes imposed.

II. DUE PROCESS CONSIDERATIONS

A. The Due Process Clause Does Not Compel The Application Of The "Home Port" Doctrine To Foreign Owned Instrumentalities Of International Commerce

Appellants begin their argument by aserting on page 22 of their Brief, "The court more than 120 years ago formulated the home port doctrine as the most appropriate means of eliminating problems of multiple taxation and interference by state or local government with the uniform regulation of foreign relations and commerce by the federal government in the highly sensitive area of international carriage of goods or persons through vessels or other instrumentalities of commerce. *Hays v. Pacific Mail Shipping Company*, 58 U.S. (17 How.) 596 (1855)." This assertion illustrates Appellants' total misconception of the *Hays* rationale. The *Hays*' court perceived the vessels as not having acquired a situs independent of its home port, where it was taxed at full value. The doctrine of taxable situs developed as a method for determining where property should be taxed. As it existed at that time, the doctrine confined taxable situs to either the owner's domicile or the place where the property came to be permanently located, the home port. An attempt to tax by any other jurisdiction would

5. See Footnote 4, above.

have been in excess of its sovereign powers. The constitutional underpinnings of the *Hays*' decision would have been the due process clause, had the Fourteenth Amendment been then adopted.[6]

It was not until the decision in *Pullman's Palace Car v. Pennsylvania*, 141 U.S. 18, 11 S.Ct. 87 (1891), that the doctrine of tax situs was expanded to include localities in which property had a continuous presence. Under the expanded situs concept, each state then had the power to tax the value of that property which was continuously used within its borders.

The *Pullman* Court in distinguishing its holding from that of *Hays* reasoned that railroad cars differed from vessels because railroad cars traversed state land while vessels traversed "National" waters. Vessels only "incidentally and temporarily" touched state ports for commercial activity which never amounted to continuous presence in the state. Logically, therefore, vessels could only have one taxable situs—their home port or their owner's domicile.

While the court in *Pullman* assumed by way of dictum that regulation of vehicles engaged in commerce by water was reposed exclusively in the federal government[7] the

6. It has been held in *Braniff Airways, Inc. v. Nebraska State Board of Equalization and Assessment*, 347 U.S. 590, 599 (1954) that the question of whether an instrumentality of commerce has a proper tax situs within a state is one of due process.

7. This dictum in *Pullman* was certainly not irregular, in view of the Court's presupposition. The concept that any area regulated by Congress precludes state taxation, rested on the assumption that a direct tax on commerce was in effect a regulation of commerce. *Case of the State Freight Tax*, 82 U.S. (15 Wall.) 232 (1872). Furthermore, the Court reasoned that vessels, by their nature, could not acquire an independent situs since their contacts with the state were tangential.

decision rested on due process considerations, as did the decision in *Hays*.

Unfortunately, in some later cases both the *Pullman* distinction between railroad cars and vessels and the Commerce Clause dictum became authority for precluding the taxation of all vessels.

Nevertheless, in *Ott v. Mississippi Valley Barge Line Company*, 336 U.S. 169, 69 S.Ct. 432, 93 L.Ed. 585 (1949), the Court announced that a non-domiciliary state may impose an apportioned tax on the tugs and barges which continually used its port and facilities while engaging in interstate commerce. After honoring the maxim that interstate commerce should be made to pay its way, the Court stated, "We see no practical difference so far as either the Due Process Clause or the Commerce Clause is concerned whether it is vessels or railroad cars that are moving in interstate commerce. . . . So far as due process is concerned the only question is whether the tax in practical operation has relation to opportunities, benefits or protection conferred or afforded by the taxing state." And the Court continued, "We can see no reason which should put water transportation on a different constitutional footing than other interstate enterprises." 336 U.S. at 174, 175, 69 S.Ct. at 434, 435.

The Court did however limit its holding to the facts and stated that it would not reach the question of the taxability of ocean vessels. It is in this circumspection that Appellants find comfort. Appellants maintain that the *Ott* Court's refusal to issue dicta manifested an intent to retain the home port doctrine as applied to instrumentalities of international commerce.

At this point Appellants' logic fails entirely. Appellants argue that since the "home port" doctrine should apply to ocean vessels then it should apply equally to the containers used in international commerce. If the decision in *Hays, Pullman* and *Ott* can be read by the loosest interpretation as fixing tax situs at the "home port" of ocean vessels, then that is all that they do. As the *Pullman* Court analyzed, instrumentalities of land commerce have a substantial connection to the state through which they traverse. Ocean-going ships, however, only touch the ports of a state, which the Court considered to be a minimal contact. By no stretch of language or imagination can these cases be read to fix the situs of the *containers* at the "home port".

Undoubtedly, the decision in *Braniff* compels the extension of the apportionment doctrine for due process reasons to all instrumentalities which are habitually employed in other than the domiciliary state. *Braniff Airways, Inc. v. Nebraska State Board of Equalization and Assessment*, 347 U.S. 590, 74 S.Ct. 757, 98 L.Ed. 967 (1954). The court distinguished those cases which favored the application of the "home port" doctrine to ocean vessels by noting that in those cases either the non-domiciliary states tried to impose unapportioned taxes or the domiciliary state was the only state in which the vessels had acquired situs.

B. The Taxes Meet The Requirements Of The Due Process Clause

The due process clause provides, "nor shall any state deprive any person of life, liberty or property without due process of the law." U. S. Const. amendment XIV.

The concern of your Amicus is cogently expressed by the Court itself.

> Constitutional provisions are often so glossed over with commentary that imperceptibly we tend to construe the commentary rather than the text. We cannot, however, be too often reminded that the limits on the otherwise autonomous powers of the states are those in the Constitution and not verbal weapons imported into it. "Taxable event", "jurisdiction to tax", "business situs", "extraterritoriality", are all compendious ways of implying the impotence of state power because state power has nothing on which to operate. These tags are not instruments of adjudication but statements of result in applying the sole constitutional test for a case like the present one. That test is whether property was taken without due process of law, or, if paraphrase we must, whether the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the state. The simple but controlling question is whether the state has given anything for which it can ask return.

Wisconsin v. J. C. Penney Company, 311 U.S. 435, 444, 61 S.Ct. 246, 250, 85 L.Ed. 267 (1940).

It is now a well settled and acknowledged proposition that a state has the power to tax all property within its jurisdiction. *McCullough v. Maryland*, 17 U.S. (4 Wheat.) 316, 4 L.Ed. 579 (1819), *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 6 L.Ed. 23 (1824).

Such a power runs afoul of neither the Commerce Clause nor the Due Process Clause of the Constitution. *Gibbons v. Ogden, supra.*

Negatively stated, the Due Process Clause will not permit a state to tax that which is beyond its jurisdiction to tax. *Passenger Cases*, 48 U.S. (7 How.) 283 (1848), *Pullman's Palace Car v. Pennsylvania*, 141 U.S. 18, 11 S.Ct. 87 (1891), *Ott v. Mississippi Valley Barge Line Co.*, 336 U.S. 169, 69 S.Ct. 432, 93 L.Ed. 585 (1949), *Braniff v. Nebraska State Board of Equalization & Assessment*, 347 U.S. 590, 74 S.Ct. 757, 98 L.Ed. 967 (1954).

Braniff and its predecessors foreclose any doubt that property employed in a state on a continuous basis may be taxed if fairly apportioned.

There has been no claim that the State of California sought to tax more than the value of the property actually present in the jurisdiction.[8] Appellants' sole contention in this regard is that pursuant to Federal Regulation, 19 C.F.R., Section 10.41A(a)(1), the containers could not be deemed to have entered the United States and therefore could not have been present within the State of California. Section 10.41a(a)(1) concerns merely the exemption of containers from tariff duties. The reliance on that regulation is wholly irrelevant to the due process issue.

The sole question therefore is, did the State of California, acting through its municipalities, satisfy the Due Process Clause when it imposed an apportioned property tax on the value of containers which travelled through the state on a regular and continuous basis. The answer to that question, simply stated, is "yes."

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8. Appellants also argue that the municipalities did not meet the presence test required by the California Administrative Code. This argument will not be addressed in the Amicus Curiae Brief of the City of Houston.

C. The Due Process Clause (And The Commerce Clause) Does Not Compel The Application Of The Complete Auto Transit "Test"

As if to skirt the simplicity of the question and answer, Appellants urge the Court to adopt the purported test of *Complete Auto Transit v. Brady,* 430 U.S. 274, 97 S.Ct. 1076, 51 L.Ed.2d 326 (1977). In referring to the analysis made in previous cases which considered the operation of the Commerce Clause, the Court made this statement:

> These decisions[8] have considered not the formal language of the tax statute, but rather its practical effect, and have sustained a tax against Commerce Clause challenge when the tax is applied to an activity with a substantial nexus with the taxing state, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State. 97 S.Ct. at 1079.

The decisions referred to in footnote eight were *General Motors Corporation v. Washington,* 377 U.S. 436, *Northwestern Cement Company v. Minnesota,* 358 U.S. 450, *Memphis Gas Company v. Stone,* 335 U.S. 80, *Wisconsin v. J. C. Penney Company,* 311 U.S. 435. It is significant that in none of those cited cases was it the Court's holding that a finding of all the factors referred to was necessary to sustain the tax. There are no other cases which your Amicus could find to support the conclusion that to validate a state ad valorem tax the factors of nexus, apportionment, non-discrimination and relation of benefits to taxes, must be individually satisfied.

In the field of ad valorem taxation, resort to this kind of analysis does nothing more than complicate the un-

complicated. Where a taxing authority imposes a tax on the *value* of property located or employed within its jurisdiction, due process has necessarily been satisfied. As the Court stated in *Ott v. Mississippi*:

> So far as due process is concerned, the only question is whether the tax in practical operation has relations to opportunities, benefits or protections conferred or afforded by the taxing state. . . . These requirements are satisfied if the tax is fairly apportioned to the commerce carried on within the State. 336 U.S. 169, 174, 69 S.Ct. 432, 434, 93 L.Ed. 585.

The "tests" of nexus, relation of tax to benefits, and apportionment, as applied to the facts of this case, are but illustrations of a single principle.

It should be remembered that the sole issue in *Complete Auto Transit* was that the tax was on the privilege of engaging in an interstate activity. The Court in recognizing this single issue commented that none of the above factors were involved as issues in the case. It appears that instead of formulating an affirmative test, the Court merely enumerated some of the factors which it had previously considered in resolving the constitutionality of state taxes.

The reflections of the Supreme Court serve to illuminate the dangers of facile attachment to formulas or tests in the resolution of constitutional issues.

> Ambiguous intimations of general phrases in opinions torn from the significance of concrete circumstances, or even occasional deviations over a long course of years, not unnatural in view of the confusing complexities of tax problems, do not alter

> the limited nature of the function of this Court when state taxes come before it. . . . *We must be on guard against imprisoning the taxing power of the state within formulas that are not compelled by the Constitution but merely represent judicial generalizations exceeding the concrete circumstances which they profess to summarize.* (Emphasis supplied)

State of Wisconsin v. J. C. Penney Company, 311 U.S. at 445, 61 S.Ct. at 250.

D. The "Users Fee" Rationale Of Appellants Is Irrelevant To This Case

Appellants advance the startling proposition that a tax on instrumentalities of commerce must in fact provide a direct and tangible benefit to the taxpayer. On page 43 of their Brief, they state: "The tax in the instant case, as a general levy used to fund all public services rendered without distinction to the recipient thereof, is not the type of tax that is permissible. The tax is used not to repay for special property usage . . . but rather, for such items as school funding, mosquito abatement and other general need without limitation. Moreover, the tax is measured by the value of the container, a criterion which is wholly void of any relationship to the use of services."

They justify their arguments by the reference in *Complete Auto Transit* to *Ingels v. Morf*, 300 U.S. 290, 57 S.Ct. 439, 81 L.Ed. 653 (1937). They totally ignore, in hopes that this Court will ignore, that the *Ingels* case does not involve ad valorem property taxes, but involves "users fees".

In *Ingels*, the state imposed a flat fee on interstate caravaning.[9] The purpose of the fee was to reimburse the state for the cost of policing caravans. The Court found Due Process and Commerce Clause violations because the fee bore no reasonable relationship to the actual cost of policing caravans.[10]

The fee in *Ingels*, as well as other public use fees, are special species of state exactions which do not pertain to the issues in this case. They represent charges to direct beneficiaries of state owned facilities to help defray the costs thereof.

In *Massachusetts v. United States*, ____U.S.____, 98 S.Ct. 1153, 1165, ____L.Ed.2d____ (1978), the constitutionality of a "users fee" was most recently considered. In that case this Court observed:

> Our decisions implementing these constitutional provisions have consistently recognized that the interests protected by these clauses are not offended by revenue measures that operate only to compensate a government for benefits supplied. See, e.g., *Clyde Mallory Lines v. Alabama, supra* (flat fee charged each vessel entering port upheld because charge operated to defray cost of harbor policing); *Evansville-Vanderburgh Airport Auth. v. Delta Airlines, Inc.*, 405 U.S. 707, 92 S.Ct. 1349, 31 L.Ed.2d 620 (1972) ($1 head tax on enplaning commercial air passengers upheld under the Commerce Clause because designed to recoup cost of airport facilities).

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9. Caravaning was defined as the act of transporting vehicles in tow.

10. It is interesting to note that although the fee did not apply to intrastate caravaning, the Court held that the fee did not offend the Commerce Clause for that reason.

> A governmental body has an obvious interest in making those who specifically benefit from its services pay the cost and, provided that the charge is structured to compensate the government for the benefit conferred, there can be no danger of the kind of interference with constitutionally valued activity that the clauses were designed to prohibit.

The "users fee" rationale does not provide a basis for determining the constitutionality of an ad varolem tax. The arguments advanced and the cases in support thereof are wholly inapposite to the issues in this case.

CONCLUSION

The Appellees have not offended the Due Process or Commerce Clause by imposing a non-discriminatory, apportioned ad varolem tax on the containers owned by Japanese domiciliaries which are used exclusively in international commerce.

Respectfully submitted,

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